STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BARBARA JEAN CROSS,

Defendant-Appellant.

UNPUBLISHED
January 24, 2003

No. 232887
Gladwin Circuit Court
LC No. 99-006443-FC

Before: O'Connell, P.J., Griffin and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316, conspiracy to commit first-degree murder, MCL 750.157a, and solicitation of first-degree murder, MCL 750.157b(2). She was sentenced to concurrent terms of life imprisonment without parole for both the first-degree murder and conspiracy convictions and fifteen to fifty years for the solicitation conviction. We affirm defendant's convictions, but remand for correction of the judgment of sentence to delete the "without parole" restriction for the conspiracy sentence.

Defendant first argues that the trial court erred by failing to question the remaining jurors after one juror was removed by stipulation of the parties. We conclude that defendant waived this issue by stipulating to remove the pertinent juror from the jury panel. Defendant clearly expressed satisfaction with the trial court's handling of the matter and thereby waived any issue relating to this aspect of the trial. See *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000) (where defense counsel "clearly expressed satisfaction" with a trial court decision, a claim of error regarding the relevant matters was waived). Indeed, the trial court expressed a willingness to "deal with it some other way, if you wish to do it," but defense counsel moved to stipulate to "just" removing the juror. "When a court proceeds in a manner acceptable to all parties, it is not resolving a disputed point and thus does not ordinarily render a ruling susceptible to reversal." *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001). Thus, we conclude that defendant waived this issue and thereby extinguished any possible error with regard to the trial court's not questioning the remaining jurors. *Id*.

Defendant next argues that there was insufficient evidence to support her convictions of conspiracy to commit first-degree murder, solicitation of first-degree murder, and first-degree premeditated murder. We disagree. In reviewing whether there was sufficient evidence to support a conviction, we view the evidence in a light most favorable to the prosecution and decide whether a rational factfinder could have found that the essential elements of the crime

were proven beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

With regard to defendant's conviction of conspiracy to commit first-degree murder, conspiracy consists, in pertinent part, of a mutual agreement between two or more people to commit a criminal act. *People v Buck*, 197 Mich App 404, 411-412; 496 NW2d 321 (1992), reversed in part on other grounds sub nom *People v Holcomb*, 444 Mich 853 (1993). To prove conspiracy to commit first-degree murder, it must be shown that "each conspirator had the requisite intent to commit the murder." *Id.* at 412. John Benjamin testified that he and defendant agreed that he should approach an acquaintance and offer him money and a vehicle in return for killing the victim. Further, John Benjamin testified that he asked Gordon Dittmer to commit the murder and that defendant gave him a check to pay Dittmer, which constituted evidence that both John Benjamin and defendant actually had an intent to murder the victim. There was sufficient evidence to support defendant's conspiracy conviction.

Turning to defendant's conviction of solicitation of murder, the law provides that a person who aids or abets the commission of a crime may be convicted as if that person directly committed the crime. *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001). A finding that a defendant aided and abetted a crime requires evidence that (1) the crime was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or knew that the principal intended its commission when the defendant gave aid and encouragement. *Id.* at 495-496. Solicitation of murder consists of (1) the solicitor purposely seeking to have someone killed and (2) trying to engage someone to do the killing. *People v Sexton*, 250 Mich App 211, 227; 646 NW2d 875 (2002). John Benjamin's testimony that he promised Dittmer money and a vehicle in payment for killing the victim was sufficient to establish that John Benjamin committed the crime of solicitation of murder. His testimony that defendant agreed with him to ask another man to kill the victim in return for payment was sufficient to establish that she gave encouragement that assisted the solicitation and that she intended the commission of the crime. Thus, there was sufficient evidence to support defendant's solicitation of murder conviction.

With regard to defendant's murder conviction, first-degree premeditated murder consists of an intentional killing of a victim that was premeditated and deliberate. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). The evidence that the victim died from a gunshot wound to the head, that Dittmer told two people that he shot the victim, and that he told one of them that he was supposed to be paid for the killing was sufficient evidence that Dittmer committed first-degree premeditated murder. This evidence together with that discussed above regarding defendant giving funds to John Benjamin to pay Dittmer for the killing, constitutes sufficient evidence to support a conclusion that defendant aided and abetted first-degree premeditated murder by providing encouragement that assisted the commission of the crime and intended its commission. Thus, there was sufficient evidence to support defendant's first-degree murder conviction.

Defendant next argues that the trial court erred by admitting testimony from John Monroe that Larry Tatro, the father of defendant's children, told him that defendant had tried to get him to kill a man. Defendant contends that this testimony was inadmissible hearsay. We disagree. We review a trial court's decision whether to admit evidence for an abuse of discretion, but "[t]o

the extent that this inquiry requires examination of the meaning of the Michigan Rules of Evidence," we review the matter de novo as a question of law. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). The trial court admitted the relevant testimony from Monroe under MRE 801(d)(1)(B), which provides that a statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement" and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Defense counsel remarked in his opening statement and while cross-examining Tatro that Tatro had fabricated his allegations against defendant in revenge for prior incidents in which Tatro was arrested for violating restraining orders involving defendant and because Tatro's parenting time with the children was suspended because of allegations made by defendant. Thus, the first prerequisite for offering evidence of a prior consistent statement under MRE 801(d)(1)(B) was met, i.e., a charge of recent fabrication or improper motive in Tatro's testimony. To be admissible as a prior consistent statement under MRE 801(d)(1)(B), however, a statement must, in relevant part, be made before the supposed motive to falsify arose. *People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000). Importantly, Monroe testified that Tatro told him that defendant asked him to kill "her boyfriend or husband or whoever the gentleman was" at a time *before* the victim was murdered. While Tatro may have had reasons to be generally ill-disposed toward defendant, he cannot reasonably be considered to have had a motive to falsely implicate her in a murder before the murder even occurred. In other words, there is no reasonable basis to conclude that Tatro could have foreseen that the victim would be murdered apart from defendant's statements to him. Without knowledge that the victim would be murdered, Tatro would not have had a plausible motive to falsely accuse defendant of essentially asking him to kill the victim before the murder occurred. Thus, the trial court did not abuse its discretion by admitting Monroe's testimony indicating that Tatro effectively told him that defendant asked him to kill the victim under MRE 801(d)(1)(B).

Defendant next advances multiple unpreserved claims of prosecutorial misconduct. We may grant relief based on such unpreserved claims only for plain error that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We find no such error here. First, while defendant's argument is rather unclear, she seems to suggest that it was improper for the prosecutor to introduce evidence that she had an economic motive for killing the victim when a provision in the judgment of divorce between her and the victim allegedly precluded her from receiving proceeds from his life insurance or inheriting his property. However, even assuming that defendant was not actually legally entitled to the economic benefits from the victim's death, regardless of her involvement in the victim's murder, the prosecution nevertheless introduced defendant's statements reflecting her belief that she would obtain life insurance proceeds and other property if the victim died. That she may have been mistaken would not be important to defendant's motive to have the victim killed if she sincerely held that belief. Similarly, evidence that defendant knew of life insurance policies on the victim's life tended to corroborate the plausibility of testimony about her belief that she could profit from his death. Accordingly, we see no basis for concluding that the prosecution acted improperly by introducing evidence related to defendant's economic motive to have the victim killed. See MRE 402 (relevant evidence is generally admissible); *People v Herndon*, 246 Mich App 371, 412-413; 633 NW2d 376 (2001) (evidence of motive "is generally relevant to show the intent necessary to prove murder").

Defendant also argues that the prosecutor violated defendant's constitutional right of confrontation by introducing hearsay testimony from Dittmer's cellmate, Freddie Grady, regarding statements by Dittmer that "Barb" was to pay him for the victim's murder out of proceeds from insurance or a lawsuit settlement. Dittmer's alleged statements to Grady were obviously against Dittmer's penal interest because he acknowledged that he had committed a murder. Had this issue been properly raised, the court would have decided whether Dittmer's statement against penal interest that also implicated defendant bore "sufficient indicia of reliability" to be admitted without violating the federal and state constitutional right to confrontation. *People v Poole*, 444 Mich 151, 163-164; 506 NW2d 505 (1993); *People v Schutte*, 240 Mich App 713, 717-718; 613 NW2d 370 (2000). According to Grady's testimony, Dittmer acknowledged in his statements that he shot the victim. The statements obviously do not tend to reduce Dittmer's criminal liability in the murder. At a minimum, no plain error ensued from the admission of the testimony at issue because it is not clear or obvious that Grady's testimony about Dittmer's statements violated defendant's constitutional right to confrontation, given the apparent reliability of Dittmer's self-incriminating statements.[1]

Defendant also contends that several of the prosecutor's remarks during closing and rebuttal argument were improper. We find no error requiring reversal. We conclude that the prosecutor's arguments regarding defendant's economic motive to have the victim killed and the lack of an innocent reason for her drawing a diagram of the victim's truck were permissible as reasonable arguments from the evidence. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). The prosecutor did not improperly vouch for the credibility of John and Billy Joe Benjamin because he did not imply special knowledge that they were testifying truthfully. *People v Rodriguez*, 251 Mich App 10, 31; 650 NW2d 96 (2002). Similarly, the prosecutor's argument that there was no evidence that Grady had a motive for testifying falsely was reasonable argument from the evidence. The prosecutor's remark that "you don't have to be smart to be a criminal" was a colorful way of expressing that it was unimportant whether defendant was correct in her belief that she would obtain the victim's house after his death. A prosecutor "is not required to state inferences and conclusions in the blandest possible terms." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Similarly, contrary to the implication of defendant's argument, it was not improper for the prosecutor to discuss at some length evidence that defendant lied to the police about various matters related to this case. We also see nothing improper in the prosecutor's responding to defense remarks about the police by

[1] We reject defendant's contention that the present situation is "indistinguishable" from *Lilly v Virginia*, 527 US 116; 119 S Ct 1887; 144 L Ed 2d 117 (1999), in which the United States Supreme Court unanimously, but without a majority opinion regarding its rationale, found a violation of the federal Confrontation Clause in the admission of certain testimony. In contrast to Grady's testimony about statements by Dittmer that acknowledged that Dittmer committed the murder, the statements at issue in *Lilly* were made to the police and involved the declarant acknowledging involvement in theft crimes but denying responsibility for a killing. *Id.* at 120-122. The statements in this case did not so downplay the declarant's criminal liability. Further, it was important to the analysis of Justice Stevens' lead opinion in *Lilly* that the government was involved in the production of the statement. *Id.* at 135 (Stevens, J.). Unlike in *Lilly*, the statements to Grady were not made to a government actor. In short, *Lilly* does not reasonably support a conclusion that the admission of the testimony at issue violated defendant's constitutional right to confrontation.

effectively pointing out that it is to be expected that the police would work hard on a murder case. See *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997) ("[a] prosecutor's comments must be considered in light of defense arguments"). Contrary to defendant's indication, the prosecutor's remarks about having proven its case beyond a reasonable doubt were not an improper expression of official or personal belief in defendant's guilt, *People v Bahoda*, 448 Mich 261, 286; 531 NW2d 659 (1995), but rather were proper as simply being part of summarizing the prosecutor's argument that the evidence showed defendant to be guilty.

We also find no error requiring reversal in the prosecutor's remarks regarding the defendant's contention that "everybody" was lying. The prosecutor's remarks were rhetorical hyperbole in that defense counsel did not literally claim "everybody's lying" or that the jury should just take his "word" regarding prosecution witnesses lying. However, comments by a prosecutor in rebuttal argument that are intended to rebut a defense theory, even if improper, do not necessarily constitute error requiring reversal if they do not result in the jury suspending its power of judgment in favor of the wisdom or belief of the prosecution. *Bahoda, supra* at 285-287. The prosecutor reasonably argued that it was improbable that the many prosecution witnesses lied to implicate defendant. Because the prosecutor's comments were not aimed at causing the jury to suspend its power of judgment, we find no error requiring reversal.

Defendant also contends that the prosecutor crossed the bounds of proper argument in rebuttal by emphasizing that defendant had picked her unsavory "associates." Defendant argues that it seems improper to suggest that the mere fact that defendant associated with such people should be a significant factor in support of convicting her. However, in *Launsburry, supra*, this Court found no error requiring reversal from improper remarks by a prosecutor referring to the defendant as a "moron," "idiot," and "coward," given the overwhelming evidence of guilt and the isolated nature of the comments. Considering the strong evidence of guilt in this case, we would likewise find no error requiring reversal based on the far less egregious reference to defendant's "associates" even if the matter had been properly preserved for review.

Next, contrary to defendant's argument, absent a request, the trial court was not required to instruct the jury regarding other acts evidence, mere presence, or defendant's theory of the case. *People v Griffin*, 235 Mich App 27, 37; 597 NW2d 176 (1999). We also reject defendant's claim of ineffective assistance of counsel based on trial counsel's failure to request such instructions. Because this ineffective assistance claim was not raised below, review is limited to mistakes apparent from the existing record. *People v Snider*, 232 Mich App 393, 423; 608 NW2d 502 (2000). To establish an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability that the outcome of the proceeding would have been different but for counsel's errors. *People v Kevorkian*, 248 Mich App 373, 411; 639 NW2d 291 (2001). With regard to a mere presence instruction, trial counsel did not fall below an objective standard of reasonableness because there was simply no evidence to reasonably support a finding that defendant was merely present while others committed the charged crimes of conspiracy to commit first-degree murder, solicitation of murder, and first-degree murder. Indeed, there was no evidence that defendant was present when the murder was actually committed. A presumption exists with regard to instructions on other acts evidence and the defense theory of the case that the challenged action might be sound trial strategy. *Id.* We conclude that defendant

has not overcome that presumption. Trial counsel may have reasonably decided that an other acts evidence instruction was undesirable because it might reinforce to the jury that there was evidence that defendant engaged in other bad acts. With regard to an instruction on the defense theory, we believe from our review of the trial record that the defense focused mainly on attacking the prosecution's case and trying to raise a reasonable doubt about defendant's guilt in the face of strong evidence of guilt. Trial counsel might reasonably have feared that an instruction on a defense theory would draw attention to the weakness of the defense case overall and that it was better to simply rely on his closing argument in which he raised arguments attacking the credibility of a number of prosecution witnesses.

We agree with defendant that the trial court erred by sentencing her to life imprisonment without parole for her conviction of conspiracy to commit first-degree murder. Under *People v Jahner,* 433 Mich 490, 504; 446 NW2d 151 (1989), "a person sentenced to life imprisonment for conspiracy to commit first-degree murder is eligible for parole consideration." Contrary to the apparent contention of the prosecution, *Jahner* is not distinguishable on the basis that the intended murders in *Jahner* were never actually committed. This distinction is immaterial to the legal analysis in *Jahner* which squarely concluded that a nonparolable life sentence may not be imposed for conspiracy to commit first-degree murder. Thus, the trial court plainly erred by imposing a nonparolable life sentence for defendant's conviction of conspiracy to commit first-degree murder. Although this issue was not raised below, we conclude that imposition of this improper sentence seriously affects the fairness, integrity, and public reputation of judicial proceedings. *Carines, supra*. Accordingly, we remand for correction of the judgment of sentence to remove the language that defendant's sentence of life imprisonment for her conspiracy conviction is nonparolable.[2]

Finally, defendant argues that she was denied a fair trial due to the cumulative effect of the alleged errors discussed above. However, with regard to defendant's preserved claims of error at her trial, we have found no error. Further, defendant waived any claim of error with regard to the trial court's actions related to the removal of a juror on stipulation of the parties. We have found no plain error warranting relief under the *Carines* standard with regard to her other unpreserved claims of trial error. Thus, we conclude that defendant is not entitled to relief based on her claim of cumulative error.

We affirm defendant's convictions, but remand for correction of the judgment of sentence to delete the "without parole" restriction for the conspiracy sentence. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin
/s/ Jane E. Markey

[2] Of course, this leaves undisturbed defendant's sentence of life imprisonment without parole for her conviction of first-degree murder.